

APPEAL NO. 170329
FILED APRIL 19, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case returns following our remand in Appeals Panel Decision (APD) 161817, decided November 2, 2016, to reconstruct the record. A contested case hearing (CCH) on remand was held on January 17, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. In the original CCH held on August 4, 2016, the disputed issues before the hearing officer were:

- (1) Did [the respondent] [c]laimant sustain a compensable injury in the form of an occupational disease, with a date of injury of (date of injury)?
- (2) Did [the] [c]laimant have disability resulting from the claimed injury, from December 10, 2015, to the present?

In the CCH on remand held January 17, 2017, the hearing officer determined that the claimant sustained a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury); and that the claimant had disability as a result of the compensable injury from December 10, 2015, to the date of the hearing. The appellant (carrier) appeals the hearing officer's determinations as being contrary to the evidence. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The claimant testified that on (date of injury), he was operating a bulldozer moving oil field waste material comprised, in part, of oil, water and chemicals, from one side to another side of a mound of waste material 60-90 feet tall and covering an area of 17 acres. He further testified that while working he was overcome by fumes, became nauseated, threw up and may have lost consciousness briefly. He left the jobsite and sought medical attention with his primary care physician who refused to see him due to noxious odors which had permeated his clothing and who told him to go to the emergency room (ER). The claimant did so and reported his complaints as nausea, vomiting, lightheadedness and weakness. The ER records dated (date of injury), list a diagnosis of "exposure to gaseous substance" and "toxic effect of gas exposure."

The claimant relies upon the reports of his treating physician, (Dr. B) and pulmonary specialists, (Dr. N) and (Dr. D), to establish the requisite causal connection between the claimed toxic exposure inhalation injury on (date of injury), and the alleged

resultant conditions suffered by the claimant. In his Decision and Order, the hearing officer stated that the reports of these physicians were persuasive evidence that the claimant sustained a compensable injury in the form of an occupational disease on (date of injury).

In a letter dated April 22, 2016, Dr. B stated:

. . . . Per the [claimant], he was at work when he was exposed to toxic fumes on 12/9/16 (sic); he felt shortness of breath and went to the ER for treatment. . . . [The claimant] was seen at (city) Memorial Hospital on 12/9/16 (sic) after being exposed to toxic fumes while on his work site, his shortness of breath has worsened since the exposure and requires that he use home oxygen nightly. . . .

In his notes concerning an office visit on May 23, 2016, Dr. N stated:

. . . . It seems quite clear based on his history that his current symptoms developed following this fume exposure which likely represent resulted (sic) in chronic bronchial inflammation with chronic bronchitis and bronchiolitis. . . . This [claimant] worked for long hours throughout the work week before his exposure to toxic chemicals on (date of injury). I think that the medical probability is that [the claimant] current condition of shortness of breath and related breathing dysfunction is a direct result of his toxic exposure at work [on] (date of injury).

In his letter dated June 8, 2016, Dr. D stated:

[The claimant] sustained inhalation lung injury while working on the top of a large pile of oilfield waste on (date of injury). . . .

Since the time of the exposure, [the claimant] has had symptoms of cough and shortness of breath. . . . His exercise tolerance has progressively declined and at present he is barely able to negotiate 20-30 feet at a time on a level terrain.

. . . . In view of his premorbid status and clinical course following the inhalation of noxious gases and results of pulmonary function tests, his current condition can be attributed to toxic inhalational lung injury.

The temporal association of onset of symptoms and exposure renders the diagnosis almost certain.

Exposure to toxic chemicals through inhalation, and the resultant effect on the body, are matters beyond common experience, and medical evidence should be submitted which establishes the connection as a matter of reasonable medical probability as opposed to a possibility, speculation, or guess. See APD 080787,

decided August 12, 2008. The fact that the proof of causation may be difficult does not relieve the claimant of the burden of proof. APD 93665, decided September 15, 1993, citing *Schaefer v. Texas Employers' Insurance Association*, 612 S.W.2d 199, 205 (Tex. 1980), and *Parker v. Mutual Liability Insurance Company*, 440 S.W.2d 43, 46 (Tex. 1969). In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986). The medical records in evidence do contain diagnoses of exposure to gaseous substance, toxic effect of unspecified substance, exposure to toxic fumes, shortness of breath, chronic bronchial inflammation with chronic bronchitis and bronchiolitis following fume exposure, and toxic inhalation lung injury but no specific chemical or toxic substance was identified and none of the medical records in evidence contain an explanation concerning how exposure to or inhalation of any substance the claimant may have encountered at work caused his symptoms.

There is insufficient evidence to relate any injury or condition the claimant may have to inhalation of toxic fumes or gaseous substance while at work on (date of injury). The hearing officer's decision that the claimant sustained a compensable injury, in the form of an occupational disease on (date of injury), is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, the hearing officer's determination that the claimant sustained a compensable injury is reversed and a new decision rendered that the claimant did not sustain a compensable injury, in the form of an occupational disease, with a date of injury of (date of injury).

Without a compensable injury, the claimant would have no disability as defined by Section 401.011(16). The hearing officer's decision that the claimant had disability from December 10, 2015, to the date of the CCH is reversed and a new decision rendered that the claimant had no disability.

SUMMARY

We reverse the hearing officer's determination that the claimant sustained a compensable injury in the form of an occupational disease on (date of injury), and render a new decision that the claimant did not sustain a compensable injury.

We reverse the hearing officer's determination that the claimant had disability from December 10, 2015, to the date of the CCH and render a new decision that the claimant did not have disability.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge